

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF INTERMARK)
CONSTRUCTION, INC., dba INTERMARK)
CANDLEWOOD, LTD.,)

Appellant,)

v.)

PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)

Respondent.)

PCHB NO. 87-213

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter concerns an appeal from two Notices of Violation and Civil Penalties of \$1,000 each for emission of smoke and flyash from a landclearing operation, allegedly in violation of Puget Sound Air Pollution Control Agency (PSAPCA) Regulation I, Section 9.11(a). A formal hearing was held on December 14, 1987, in Seattle, Washington before the Pollution Control Hearings Board. Seated for and as the Board were Lawrence J. Faulk (Presiding), and Judith A. Bendor, Wick Dufford has reviewed the record. Respondent agency elected a formal hearing pursuant to RCW 43.21B.230. The hearing was officially reported by Lettie Hybrides of Evergreen Court Reporting.

1 Appellant Intermark Candlewood, Ltd., appeared and was represented
2 by Steven Bankhead, project manager. Respondent public agency PSAPCA
3 appeared and was represented by its attorney, Keith D. McGoffin.

4 Witnesses were sworn and testified. Exhibits were admitted and
5 have been examined.

6 From the testimony heard and exhibits examined, the Board makes
7 these

8 FINDINGS OF FACT

9 I

10 Respondent PSAPCA is an activated air pollution control authority
11 under terms of the state's Clean Air Act, empowered to monitor and
12 enforce outdoor burning in a five-county area of mid Puget Sound.

13 The agency, pursuant to RCW 43.21B.260, filed with this Board a
14 certified copy of its Regulation I (and all amendments thereto), of
15 which the Board takes notice.

16 II

17 Intermark Candlewood, Ltd., is the property owner of land located
18 at 151st Avenue Southeast and Petrovitsky Road, in Renton,
19 Washington. The land was being cleared of vegetation when the alleged
20 violation occurred.

21 III

22 On June 16, 1987, at approximately 2:00 p.m., a citizen residing
23 near the land-clearing site called PSAPCA and complained about smoke

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1 from a landclearing fire which affected him at his residence.

2 At approximately 2:05 p.m., the PSAPCA inspector went to the
3 complainant's home. The inspector observed two large outdoor fires,
4 approximately 100 yards and 200 yards in a southerly direction from
5 the residence on the Intermark Candlewood property.. The sky was
6 clear, the weather was warm, and the winds were light coming from the
7 south and the southwest.

8 IV

9 The inspector observed that both outdoor fires were emitting
10 smoke, and that the odor was immediately evident. He rated the odor
11 as distinct, definite and unpleasant. The inspector observed flyash
12 from the fires being blown onto the exposed surfaces in the vicinity.
13 The inspector's eyes began to water and sting and the inspector found
14 it uncomfortable to breathe the smokey air.

15 V

16 The inspector rated the fire's odor at level 2, using the
17 following scale:

18 0 - No detectable odor

19 1 - Odor barely detectable

20 2 - Odor distinct and definite, any unpleasant characteristics
21 recognizable

22 3 - Odor strong enough to cause attempts at avoidance

23 4 - Odor overpowering, intolerable for any appreciable time.

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1 This rating scale is used by PSAPCA not as a regulatory standard, but
2 as a shorthand method for preserving impressions for evidentiary
3 purposes.

4 The complainant made a sworn statement in which he stated that he
5 was unable to open the windows or clear on the south side of his
6 condominium during the burning because of the smoke, and that the
7 smoke odor could be smelled inside even with the windows closed.

8 VI

9 The inspector drove to the landclearing fires where he took
10 photographs of the burning and contacted Lewis Bankhead, Project
11 Manager for appellant company. The inspector advised Mr. Bankhead
12 that a Notice of Violation would be sent to his company for burning
13 causing detriment to persons or property. On June 24, 1987, Notice of
14 Violation No. 022056 was sent via certified mail.

15 VII

16 On June 24, 1987, at approximately 8:05 a.m. another citizen
17 residing in the same Renten neighborhood called PSAPCA and complained
18 about smoke from a landclearing fire which affected him at his
19 residence. At approximately 9:00 a.m. the inspector made contact with
20 the complainant at his residence.

21 The inspector observed that flyash was falling out on exposed
22 surfaces and that the odor of smoke was present in the ambient air. A
23 plainly visible residue of ash was noticed on lawn furniture and
24

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1 decking and the residence itself. The complainant, by affidavit,
2 described not only problems from ash outdoors, but from soot and smoke
3 penetrating into the house and settling into clothing in the closet.

4 The inspector observed that the source of the smoke and the flyash
5 were landclearing fires located three to six hundred yards north of
6 the complainant's residence. These were at the same site as the fires
7 that were observed on June 16, 1987. The wind was coming from the
8 north; the day was clear and warm.

9 During the course of his investigation on June 24, 1987, the PSAPCA
10 inspector also received complaints from other residents in the
11 neighborhood, five of which later provided sworn statements regarding
12 adverse effects they had suffered from the smoke and ash emanating
13 from Intermark Cadlewod's burning. They described a variety of
14 problems including interference with use of their decks and lawns,
15 soot on their outdoor furniture and cars, smoke inside and outside
16 their houses, stinging eyes, sore throats, aversion to the smell.
17 PSAPCA's inspector verified adverse effects at each of their
18 residences.

19 VIII

20 After making observations at the various residences and taking
21 photographs of his observations, PSAPCA's inspector, accompanied by
22 the battalion chief for the local fire district visited the burn
23 site. (On June 23, 1988, over 100 residents of the neighborhood had
24 petitioned the fire district to rescind Intermark Candlewood's
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1 burning permit because of adverse effects they claimed were occurring
2 at established homes in the area.) At the site, he observed six
3 xmoldering piles of land clearing debris of various sizes, spread out
4 over approximately one area.

5 The fire chief thereupon advised Intermark's representative that
6 he was withdrawing its fir permit and a fire truck from the district
7 proceeded to extinguish the burning.

8 In response to his observations on June 24, 1988, PSAPCA's
9 inspector issued seven Notices of Violation (Numbers 022057, 022058,
10 022059, 022060, 022061, 022062, and 022063) via certified mail on July
11 6, 1987, each notice representing a separate address where his
12 investigation had documented adverse affects.

13 IX

14 On August 21, 1987, respondent agency mailed Notices and Orders of
15 Civil Penalties Nos. 6724 and 6725 (for \$1,000 each) for allegedly
16 violating Regulation I, Section 9.11(a) on June 16 and 24, 1987.
17 Appellant received these civil penalties on August 24, 1987.

18 X

19 Feeling aggrieved by these actions appellant appealed to this
20 Board on September 9, 1987. At the hearing, appellant company did not
21 question legal liability. Appellant did contest the amount of the
22 penalty, believing it to be excessive.

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XI

PSAPCA allows landclearing burning within areas where the population density within .6 of a mile from the proposed burn site is less than 2,500 persons. Prior to the burning in question, the agency had issued a verification that the proposed site was in such an area. The verification document, however, explicitly stated that it is unlawful for such burning to cause injury or unreasonable interference with life and property.

XII

Appellant stated that they had contracted with another firm to perform the actual burning of the vegetation. Appellant admitted that in fact damage had occurred. Appellant stated that burning could have been handled in such a way that the damage to enjoyment and property would not have occurred. After they stopped burning, they did haul the debris to an approved disposal site. They also made some effort to provide for cleaning in and around the homes of citizens who were impacted by the smoke and flyash from the fires.

XIII

Any Conclusion of Law hereinafter determined to a Finding of Fact is hereby adopted as such.

From these Facts, the Board comes to these

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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these persons and these matters.
4 Chapters 70.94 and 43.21B RCW. The case arises under regulations
5 implementing the Washington Clean Air Act, Chapter 70.94 RCW.

6 II

7 The Legislature of the State of Washington has enacted the
8 following policy on outdoor fires:

9 It is the policy of the state to achieve and maintain
10 high levels of air quality and to this end to minimize
11 to the greatest extent reasonably possible, the burning
12 of outdoor fires. Consistent with this policy, the
13 legislature declares that such fires should be allowed
14 only on a limited basis under strict regulation and
15 close control. RCW 70.94.740.

16 III

17 Under terms of Section 9.11(a) of PSAPCA Regulation, certain air
18 emissions are prohibited:

19 (a) It shall be unlawful for any person to cause or
20 allow the emission of any air contaminant in sufficient
21 quantities and of such characteristics and duration as
22 is, or is likely to be, injurious to human health, plant
23 or animal life, or property, of which unreasonably
24 interferes with enjoyment of life and property.

25 This formulation parallels the definition of "air pollution" contained
26 in the State Clean Air Act at RCW 70.94.030(2). The language is
27 similar to the traditional definition of a nuisance. See RCW 7.48.010.

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IV

On June 16 and 24, 1987, odors, smoke and flyash emanating from landclearing fires caused and allowed by appellant, traveled onto a nearby residential property so as to unreasonably interfere with enjoyment of life and property, in violation of PSAPCA Regulation I, Section 9.11(a).

V

Appellant is in a business which routinely engages in landclearing by burning. The company should be aware of the limitations on its conduct. Even landclearing burning, where otherwise allowed, RCW 70.94.750(2), must not cause the adverse effects forbidden by Regulation I, Section 9.11(a).

VI

Numerous complaints had been received by PSAPCA and the Fire Department about this multi-day landclearing fire. Only after the fire district revoked its burning permit did the appellant ultimately dispose of the vegetation by alternative methods. See RCW 70.94.745. However, it was too late. The flyash was already out of the fire. The damage was already done.

VII

PSAPCA's Regulation I, and the Washington State Clean Air Act provide for a maximum civil penalty of \$1,000 per day for occurrences of this kind. The purpose of the civil penalty is not primarily

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1 punitive, but rather to influence behavior. Considering all the facts
2 and given the need to promote compliance among members of the public,
3 a \$2,000 monetary sanction is supported in this case.

4 Under all the facts and circumstances, we believe the penalties
5 assessed here were reasonable.

6 VIII

7 Any Finding of Fact hereinafter determined to be a Conclusion of
8 Law is hereby adopted as such.

9 From these Conclusions, the Board makes this
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ORDER

Notice and Order of Civil Penalty Nos. 6724 and 6725 are
AFFIRMED.

DONE this 31st day of May, 1988.

POLLUTION CONTROL HEARINGS BOARD

Lawrence J. Faulk 5/31/88
LAWRENCE J. FAULK, Presiding

Wick Dufford
WICK DUFFORD, Chairman

Judith A. Bendor
JUDITH A. BENDOR, Member

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